

## **REMARKS / ARGUMENTS**

Claim 2 is canceled, having been incorporated into claim 1.

Claims 1-16 and 18-22 are rejected in the instant action as being obvious. In further support of the nonobviousness of the invention, applicant submits the Declaration of Suzanne Knox, a purchasing agent for PETsMART, Inc. who reviews about 2000 new products annually. In her Declaration, Ms. Knox states the following:

- She has never been shown and is not aware of any commercially available yard stake or similar pet product that is intended for use in training a pet to eliminate in a particular outdoor area.
- The "Pee Post" yard stake [marketed by The Bramton Company, assignee of this application] is one of the best-selling new products of PETsMART.
- Based upon her considerable experience in the industry, it is clear to her that the "Pee Post" yard stake is a commercially successful product and is meeting a longstanding need that was not previously being met by any other commercially available product of which she is aware.

In further support of the nonobviousness of the invention, applicant submits the Second Declaration of Susan Crawford Pope, who states in her declaration that:

- The treated yard stake marketed by The Bramton Company under the trademark "Pee Post" is as recited in the claims of the subject application.
- Exhibit A comprises photocopies of 11 pages from a Google search for "Pee Post" done March 9, 2005, that lists [approximately 40] websites on which the "Pee Post" product was being actively marketed or touted by others as of that date.
- The widespread attention and commercial success that the treated yard stake of the invention has received since its commercial introduction are indicative of both the long-felt need for such a product and the enthusiastic response of pet-knowledgeable consumers to the solution provided by her invention.

- This outstanding response has not been created by exceptional or extraordinary promotional efforts or by extensive advertising, and is instead attributable to the appeal and efficacy of the claimed product.

Entry of these declarations is respectfully requested even if the obviousness rejections are not withdrawn. Applicant renews in this response all arguments previously made.

As amended, each of the rejected claims recites a “yard stake” as the operative invention. The examiner relies heavily on U.S. 5,287,826 to Mohamed in rejecting each subgroup of the claims. However, neither Mohamed nor any of prior art discussed in the background portion of Mohamed's specification even *mentions* a yard stake. Instead, Mohamed talks (col. 6, l. 5-8) about molding scented polymers “into a dish” having “enhanced portability.” Other disclosed scent-carrying substances mentioned in the background of Mohamed include litter, pads, peanut hulls, an animal toilet, and a receptacle. No mention is made in Mohamed of a yard stake that can be placed in a stationary position in an outdoor location. As to the particular scents claimed by applicant, Mohamed teaches *against* their use, instead requiring  $\beta$ -ionone and other untested but “expected to work” ionone analogs.

Because Mohamed *fails to teach* the structure now recited in applicant's amended claims, teaches the desirability of enhanced portability as distinguished from the use of a yard stake, and *teaches away from* use of the scenting agent as recited in applicant's claims, in fact requiring the use of a different agent, it cannot serve as the primary foundation and support for an obviousness rejection of all the claims, and a *prima facie* case of obviousness has not been established as to the rejected claims. This is not an argument being presented for the first time in this paper, as claims 2 and 22, already limited to a “yard stake,” are also under rejection based on Mohamed. Applicant respectfully submits that the rejections based upon Mohamed are legally indefensible and should be reconsidered and withdrawn.

The examiner attempts to rely on unsupported conclusory assertions of obviousness (third subparagraph of paragraph 2 and in paragraph 5) to mask the deficiencies of Mohamed and Fain, and to establish *prima facie* obviousness. Applicant requests the citation of prior art demonstrating that “one of ordinary skill in the art” at the time would have known without benefit of hindsight to employ p-cresyl acetate in a yard stake to induce elimination in canines, and not for use as a flavoring or perfume. The examiner suggests that conducting experimentation on already known and invented ingredients is *routine*. It is hard to imagine a more daunting “general test procedure” than having to try literally millions of scented compositions to find one or two producing the desired result.

While the examiner may personally disagree, and may subjectively believe the scent selection process to be “obvious” or “routine,” applicant respectfully submits that the examiner’s opinion alone is not basis enough to reach the conclusion that the recited invention is obvious in the face of sworn testimony to the contrary by those who are grounded in the very industry to which the invention pertains. Even if it is determined that a *prima facie* case of obviousness is established, the evidence of secondary considerations of non-obviousness is sufficiently persuasive to overcome the rejections.

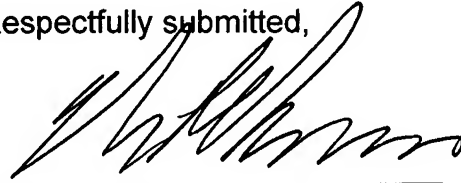
Fain discloses the general use of “odorous substances” but fails to disclose the scent agents recited in applicant’s claims. Reichert discloses microspheres or microporous beads impregnated with a scent appropriate to the intended animal behavior but discloses dispensing the beads from a shaker.

Applicant respectfully requests that the amendments be entered and that the rejections be reconsidered and withdrawn. There is no new issue or question presented here that was not already on the table or that should not be resolved in this application. Applicant should not have to pay another filing fee in order to have the accompanying declarations made of record, having been necessitated by the final rejection even of claims 2 and 22. Had those claims been allowed or indicated as allowable in the

previous action, applicant could have amended the other claims without the necessity or expense of seeking additional proof of nonobviousness.

A check in the amount of \$120 is enclosed in payment of the extension fee. Please charge any additional fee that may be required or credit any overpayment to Deposit Account No. 12-1781 of Locke Liddell & Sapp, LLP.

Respectfully submitted,



---

Monty L. Ross  
Registration No. 28,899  
(214) 740-8519

MLR:  
MAY 2, 2005  
LOCKE LIDDELL & SAPP LLP  
2200 Ross Ave., Suite 2200  
Dallas, Texas 75201-6776  
(214) 740-8519 Telephone  
(214) 756-8519 Facsimile